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Before: Lynn A. Robeson, Hearing Examiner

HEARING EXAMINER'S OPINION AND DECISION

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I. STATEMENT OF THE CASE

Petition S.E. 11-03, filed on October 12, 2010, requests a special exception to operate a child day care facility for up to 12 children.¹ The facility would be located in the basement of an existing one-family, detached home at 1804 Sanford Road, Silver Spring, Maryland, in the R-60 Zone.

Petitioner, who owns and resides in the home, has been operating a licensed child care business (*i.e.*, a “family day care home”) in her home for up to 8 children since February 2008 (Exhibits 10 and 22). There is no special exception for the existing family day care home because such a facility is permitted without a special exception in the R-60 Zone; however, a special exception is required to operate a child day care center in the R-60 Zone, pursuant to Zoning Ordinance §59-C-1.31(d). The day care facility is called “Peekaboo Daycare.”

Under the provisions of the Zoning Ordinance, §59-G-1.12, the Hearing Examiner is authorized to hear and decide this type of petition. On September 10, 2010, the Office of Zoning and Administrative Hearings issued a notice that the public hearing would be held before the Hearing Examiner on April 4, 2011, at 9:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building (Exhibit 14).

¹ A “child day care center” is one of three types of “child day care facilities” defined in Zoning Ordinance §59-A-2.1. The other two are “family day care homes” for up to 8 children and “group day care homes” for up to 12 children.

A “child day care center” is defined in §59-A-2.1 as:

- a. a dwelling in which child day care services are provided and the provider is not a resident and does not meet the requirements for a non-resident provider of a family day care home or a group day care home, or;
- b. a building in which child day care services are provided:
 - 1) for 13 or more children, or;
 - 2) which exceed the staffing limits of a family day care home, or a group day care home, or;
 - 3) for 24 hours a day provided that they are in conformance with state and local regulations.

At the request of Technical Staff of the Maryland-National Capital Park and Planning Commission, the public hearing was rescheduled to June 10, 2011. Technical Staff recommended approval of the special exception with conditions (Exhibit 22).² On June 2, 2011, the Montgomery County Planning Board (“Planning Board”) voted unanimously to endorse the Technical Staff’s recommendations. Exhibit 23.

One individual opposing the application submitted a letter into the record just prior to the hearing. Exhibit 25. Mr. Paul Gillis, an adjoining neighbor, appeared at the hearing in opposition to the application. Subsequent to the public hearing (but while the record remained open), the Hearing Examiner received several letters both in support and opposition to the application. Exhibits 24, 25, 27(a), 30(a)-(e). Some of the letters supporting the daycare were from parents of children enrolled there. These letters stated that they had never had a problem finding parking while dropping off or picking up their children. Exhibits 30(c) and (e). Other supportive letters came from neighbors, who believed that the daycare provided an important community service, that it was maintained in a clean and neat condition, and that parking on the street was not a problem. Exhibits 30(a), (b) and (d). Two of these letters were from neighbors who lived immediately adjacent and directly confronting the property. Exhibits 30(a) and (b). Those opposed to the daycare expressed concerns that existing parking on the street is already difficult, that the use was a commercial use not appropriate for a residential neighborhood, and that screening of the rear yard was inadequate. Exhibits 24, 25, 27(a).

The hearing was convened, as scheduled, on January 21, 2011, and testimony was presented in support of the petition by Petitioner. Petitioner adopted the findings and conclusions in the Technical Staff report as a part of her testimony and agreed to the conditions Staff recommended. T. 5. Mr. Paul Gillis testified that his property was higher than Petitioner’s property by approximately

² The Technical Staff report is frequently quoted and paraphrased herein.

3 feet, and requested that the wooden privacy fence proposed be changed to a “green screen” or tall landscaping. T. 41-44.

The record was held open until July 20, 2011, to permit the Petitioner to submit a revised special exception plan to Technical Staff and the Hearing Examiner showing landscaped screening along Mr. Gillis’ property line. Petitioner did submit a revised site plan/landscape plan (Exhibit 32(d)). Technical Staff reviewed the revised plan and again recommended approval of the petition. Exhibit 33.

Based on a thorough review of the entire record, the Hearing Examiner concludes that the special exception should be granted for up to 12 children, subject to the conditions listed in Section IV of this Decision.

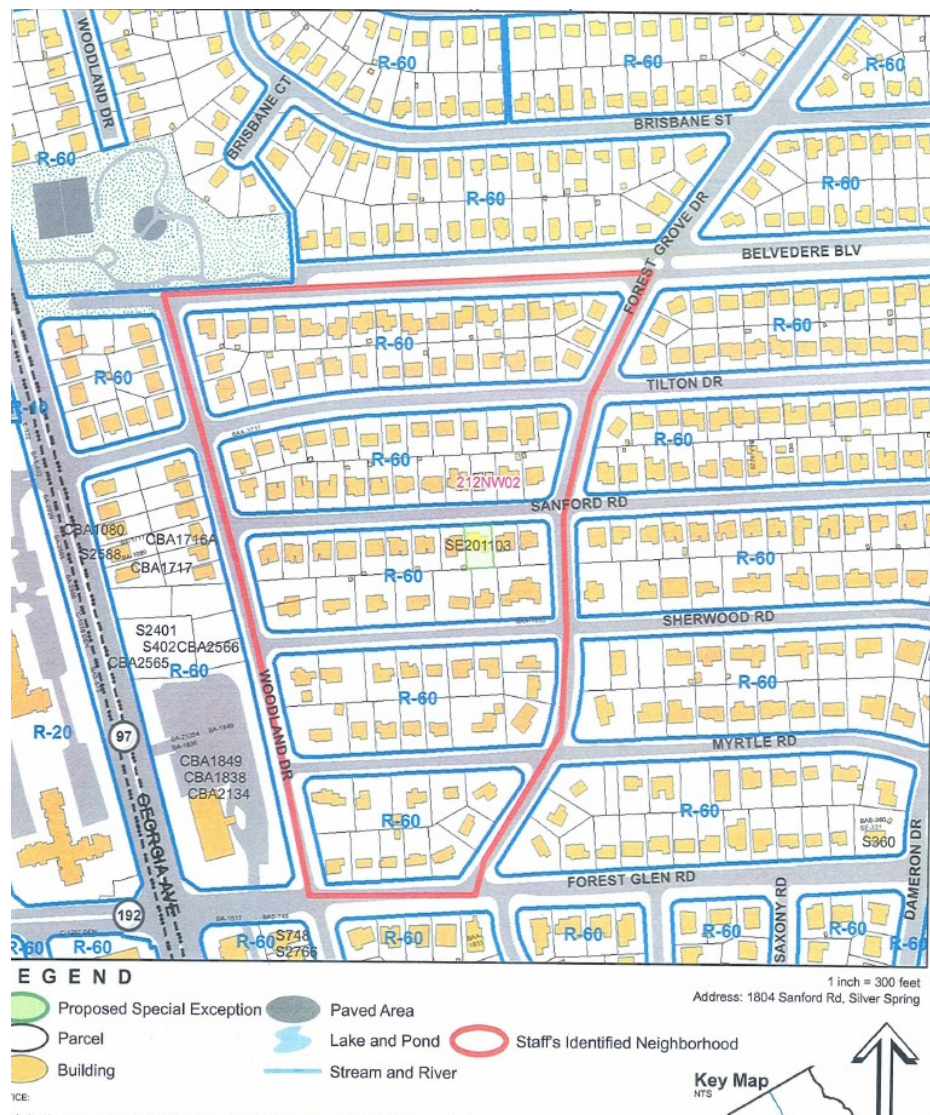
II. FACTUAL BACKGROUND

A. Subject Property and Surrounding Neighborhood

The proposed child day care center would operate in the finished basement of an existing, single-family, detached, single-story home, at 1804 Sanford Road, Silver Spring, Maryland. The property’s legal description is Lot 16, Block 2 in the “Forest Glen Homes” subdivision and is located on the south side of Sanford Road east of Georgia Avenue and approximately 3 blocks north of Forest Glen Road. Exhibit 22. A general locational map (Exhibit 22, Attachment 1) showing the location of the subject property and the neighborhood boundaries as determined by Technical Staff, is shown on the next page. The property is setback approximately 33 feet from Sanford Road, 8 feet from each side property line and approximately 44 feet from the rear property line, as shown on the special exception site plan. Exhibit 22, p. 2. The property is accessed from a driveway on Sanford Road, which currently has parking for one vehicle. Technical Staff advised that there is on-street parking, but mistakenly indicated that there are no on-street parking restrictions. Exhibit 22, p. 2. Mr. Gillis

testified that there were parking restrictions along Sanford Avenue and stated that owners were limited to two parking permits and one visitor's permit due to the property's proximity to the metro station. T. 32. Ms. Koushan confirmed that there were parking restrictions and added that visitors may park less than two hours at a time without a permit. Exhibit 32.

Technical Staff identified the neighborhood boundaries (Exhibit 22, Attachment 1) as Belvedere Boulevard to the north, Forest Grove Drive to the east, Forest Glen Road to the south, and Woodland Drive to the west. According to Technical Staff, the neighborhood is characterized by single-family detached homes within the R-60 Zone.



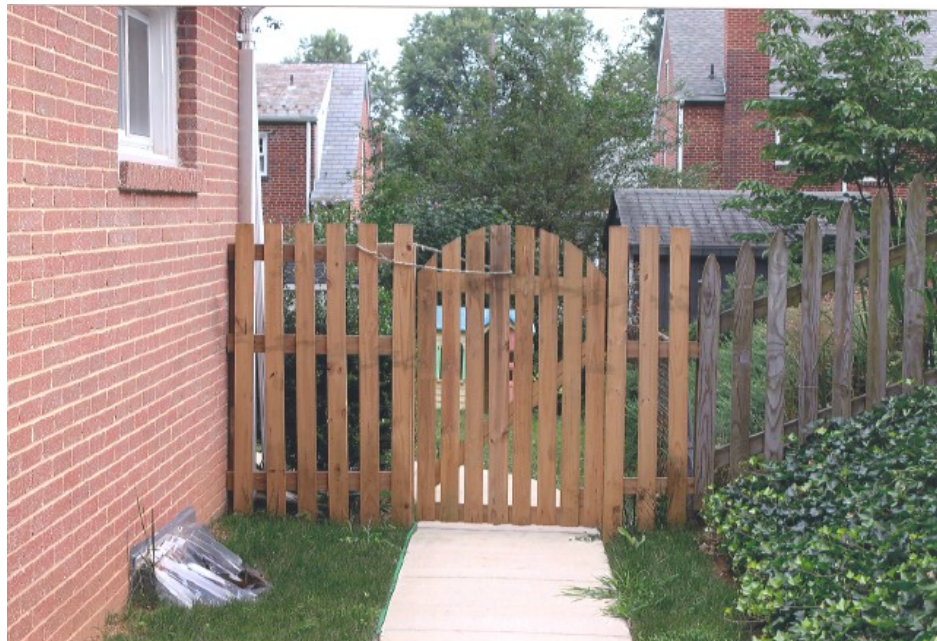
**General Locational Map and
Neighborhood Boundaries (Ex. 22)**

The existing daycare operates out of the single-family home. A concrete walkway runs from the front yard to the rear of the property which is used for a play area for the property. T. 3.

Photographs taken by the Petitioner of the existing use are shown below:



**Picture Showing Front Driveway with
Walkway to Rear (Ex. 12(a))**



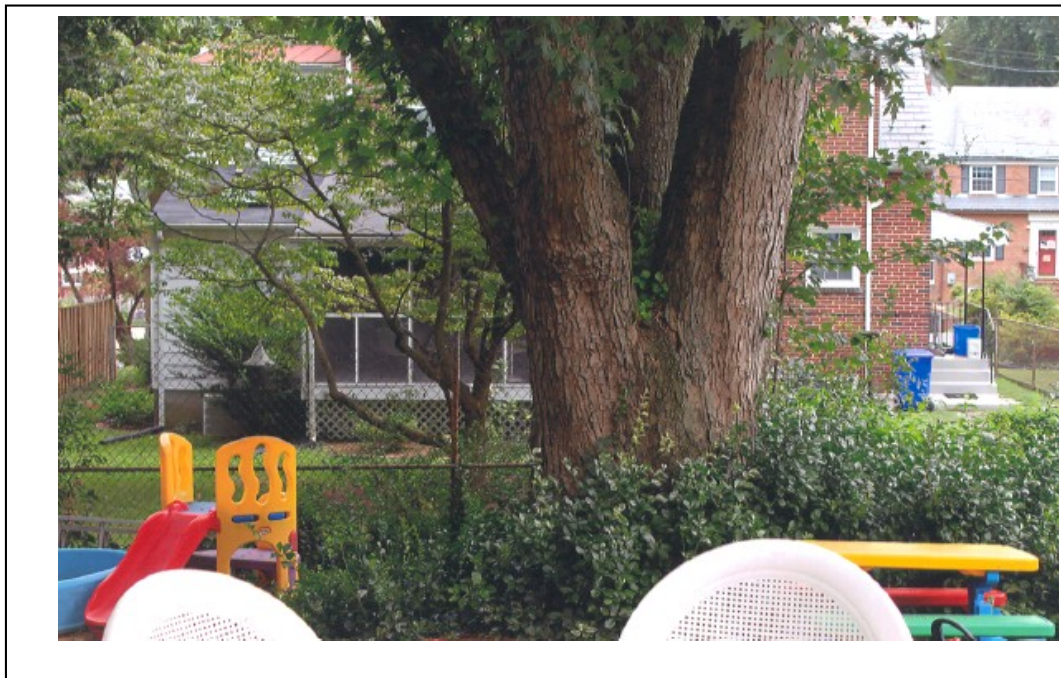
**Side Gate Access to Rear Yard
(Exhibit 12(e))**



**View of Eastern Property Line
(1802 Sanford Road) Exhibit 12(h)**



**View of Western Property Line
(1806 Sanford Rd. /Gillis Property)
(Ex. 12(g))**



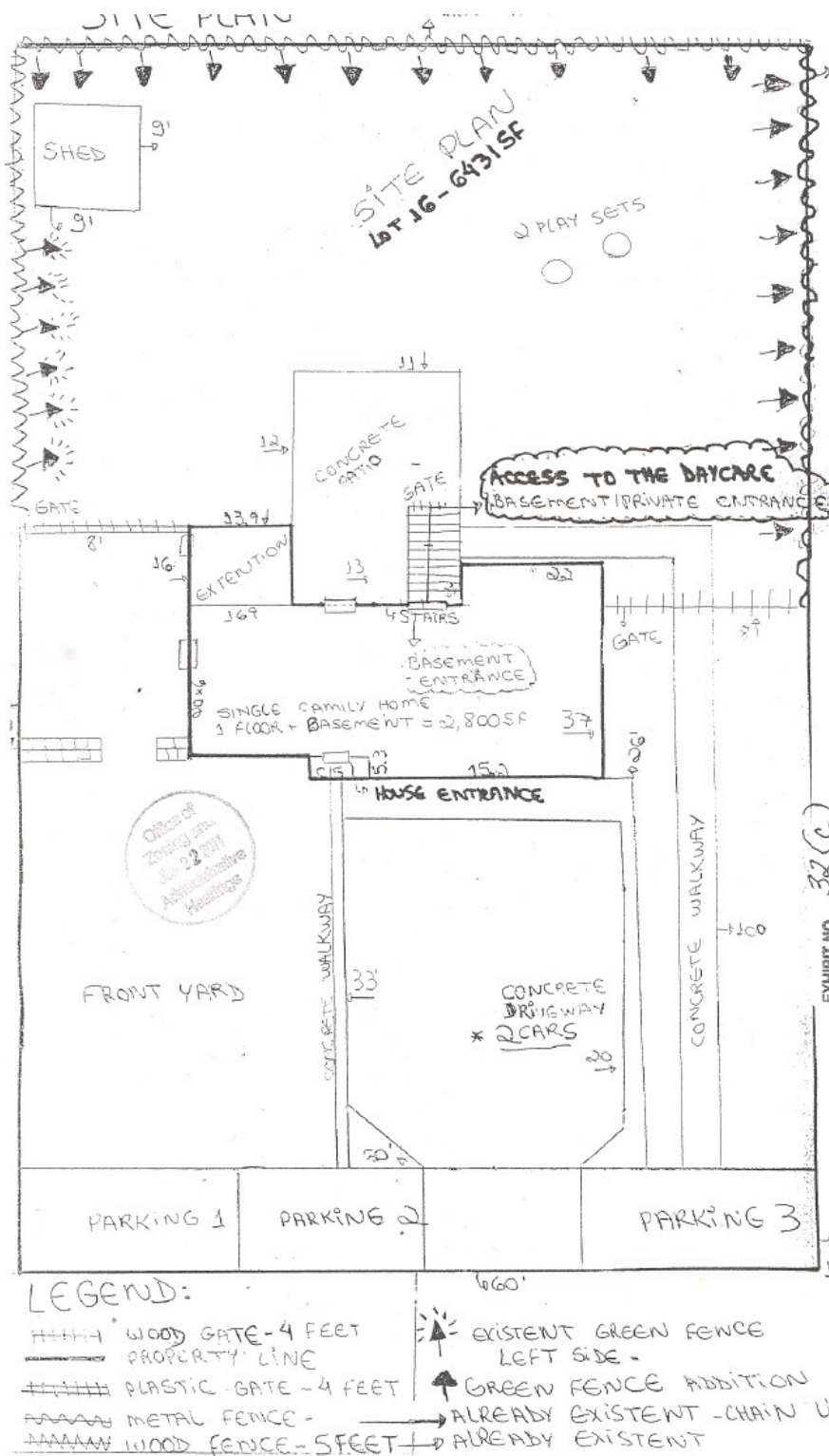
**View of Rear Property Line
(Exhibit 12(g))**

B. The Proposed Use, Parking, Landscaping, Lighting, Signage and Operations

1. The Proposed Use

Petitioner, who owns and resides in the home, has been operating a licensed child care business (*i.e.*, a “family day care home”) in her home for up to 8 children since 2008 (Exhibits 10 and 22). Petitioner proposes to expand the existing “family day care home” into a “group day care home” for up to 12 children, two of which will be her own children and one of which is the child of the non-resident staff person. Exhibit 10; T. 5. Children will range in age between 6 months and 4 years old. Exhibits 20(b), 22, p. 3. There is no special exception for the existing family day care home because such a facility is permitted without a special exception in the R-60 Zone; however, a special exception is required to operate a group day care home in the R-60 Zone, pursuant to Zoning

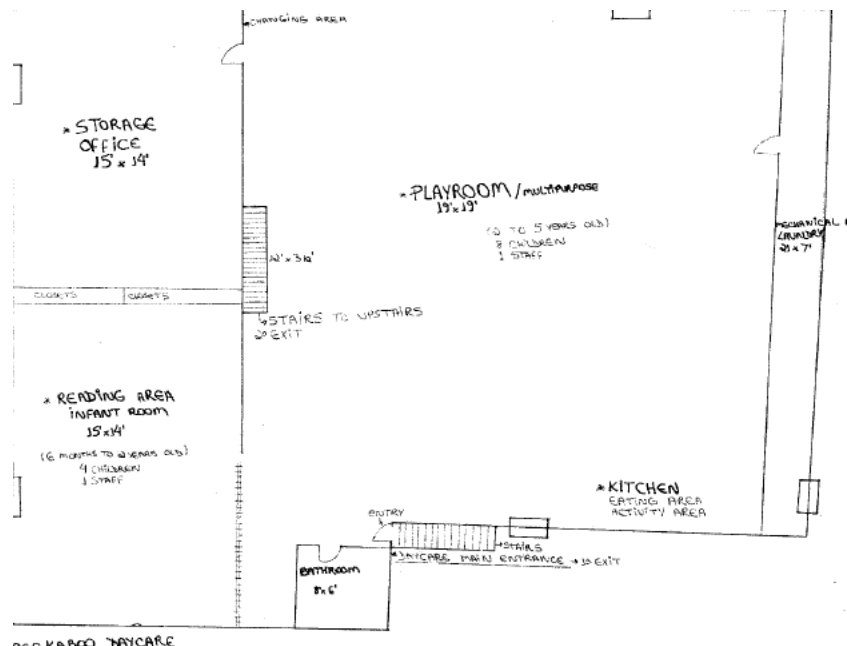
Ordinance §59-C-1.31. The day care facility is called “Peekaboo Daycare.” Exhibit 10. A revised site plan Exhibit 32(c) showing the new landscaping and the widened driveway is set forth below:



2. Operations

Petitioner proposes to operate between 7:30 a.m. and 6:00 p.m., Monday through Friday. The daycare will not operate on weekends or overnight at any time. Pick-up and drop-off will occur in the public street in front of the home. Petitioner has agreed to stagger parent arrival/pick-up times between 8:00 a.m. and 9:00 a.m. in the morning and 4:00 p.m. and 6:00 p.m. in the evenings. Exhibit 22, p. 3; T. 5, 25. Petitioner states that the children play outdoors twice a day, weather permitting, for no more than 45 minutes at a time. Exhibit 32. With the exception of parent departure and arrival, all of the activities associated with the business will be conducted within the home or in the rear yard. Exhibit 10. The outside play area for children is located in the rear yard which is enclosed with a chain link fence. Petitioner proposes to plant additional landscaped screening along western and rear property lines. Exhibit 32. The Floor Plan for the child care facility is reproduced below and consists of approximately 1,000 square feet (Exhibits 5 and 10).

:



All cooking is done in the applicant's residence on the main floor of the dwelling. The "kitchen" area shown on the Floor Plan is used to warm food and clean items. T. 8.

In addition to Petitioner, the child care facility will have one full-time, non-resident employee who will work between 7:30 a.m. and 6:00 p.m. Exhibits 10, p. 2; 22.

3. Parking

The number of parking spaces required for this use is determined by Zoning Ordinance §59-E-3.7, which provides, in relevant part:

Child day care facility. *For a family day care home or group day care home, one space for every non-resident staff member in addition to the residential parking requirement. The required number of spaces may be allowed on the street abutting the site. For a child day care center, one space for every non-resident staff member in addition to the residential parking requirement if applicable and adequate parking for discharge and pick up of children. In this instance, the average drop off and pick up space required is one space for every six children. Waivers and variances are allowed in accordance with the Zoning Ordinance. (Emphasis supplied).*

Based on this provision, Technical Staff calculated that 4 parking spaces would be required – one (1) space for the non-resident staff member, two (2) spaces for the residence, and one space for parent pick-up and drop-off. Exhibit 22, p. 3. Technical Staff advises that, if widened a minimum of four feet, the driveway may accommodate 2 cars. It also found that there was room for one on-street parking space in front of the home without blocking the driveway. Exhibit 22, Attachment 7. Technical Staff recommended reducing the required parking to 3 spaces provided (1) the Petitioner widened the driveway to accommodate two cars, and (2) the arrival and departure times for the children are staggered between 8:00 a.m. and 9:00 a.m. and between 4:00 p.m. and 6:00 p.m., respectively. Exhibit 22, Attachment 7. Petitioner has agreed to both conditions. T. 5, 9-10, 20-22. Petitioner testified that additional on-street parking is available because the household adjacent to the east does not use any on-street parking. T. 23. A picture of the on-street parking, taken by

Petitioner (Exhibit 12(d)), is shown on below. The single non-resident employee will park on-street, but not in front of the home so that parent drop-off and pick-up may occur in front of the house. T. 36.

There was testimony from Mr. Gillis at the public hearing that on-street parking has been difficult. T. 32-39. He indicated, however, that the parking problem on the street was at least in part due another home with numerous residents which had obtained multiple parking permits. T. 38-39. Similarly, neighbors submitting letters in opposition to the petition also indicate that a parking problem on the street is not a result of Petitioner's existing use. Exhibit 27(a).



**Photograph of Available On-Street
Parking (Ex. 12(d))**

Petitioner indicates that she is able to widen the driveway without impacting the number of parking spaces on the public street abutting the property, as shown on the revised site plan. Exhibit 32; 32(c). Based on the two conditions which Petitioner has agreed to perform, Technical Staff advises that a waiver of the number of off-street parking spaces is appropriate and that parking is adequate for the use. T. 9; Exhibit 22.

4. Lighting Plan

The Petitioner proposes to illuminate the facility with a total of three lights mounted on the side and rear of the dwelling along the path of access to the rear entrance to the daycare. Exhibit 4, Exhibit 22, p. 5. There is a double flood light at the rear of the house and a 100-watt hooded residential fixture located above the rear patio door. A second 100-watt residential fixture is located on the side of the house along the concrete sidewalk. Exhibit 22, p. 5. Technical Staff found that “[t]here is no glare onto adjoining properties, and there are no external lighting changes proposed.” Exhibit 22, p. 5.

5. Landscaping/Screening

Initially, Petitioner proposed no exterior changes with the exception of a 6-foot tall wooden privacy fence surrounding a portion of the rear yard. Exhibit 4. At the request of an adjoining neighbor, Mr. Paul Gillis, Petitioner amended the application to keep the original chain link fence around all sides and to add a landscaped screen of trees along the western property line (bordering Mr. Gillis’ property) and the rear property line, as depicted on the revised site plan/landscape plan Exhibit 32(c) (shown on page 10) and described on Exhibit 32(b).

Technical Staff found the revised landscape plan acceptable, stating, “[W]e believe the landscape screening on all three side [sic] would be a softer and more appropriate edge along surrounding residential properties.” Exhibit 38(a).

6. Signage

Petitioner has an existing permit for a small, freestanding, non-illuminated sign located in the front yard of the property. Petitioner proposes no changes to the existing sign. Exhibit 11. A photograph taken by Petitioner (Exhibit 12(a)) depicting the sign is shown below:



C. Master Plan Conformance and Compatibility

The subject site is within the Forest Glen East Area of the Forest Glen Sector Plan, approved and adopted in 1996. The Master Plan text does not directly address the subject site, and Technical Staff noted that the Master Plan does not specifically address child day care centers. Staff found, however, the proposed use to be in compliance with the Plan's recommendations for special exceptions (Exhibit 22, p. 4):

Staff has concluded that the proposed use is compatible with the neighborhood for the following reasons: (1) the property will retain its residential appearance – no external changes will be made; (2) only the lower level of the home will be used for the operation of the special exception; and (3) the rear yard will be used as a play area to include recreational equipment for children, and it will be fully enclosed and buffered by a six-foot wood fence.

The revised landscape plan, which shows a “green screen” of landscaped trees along the along the property line of Mr. Gillis property and along the rear property line, also met with Technical Staff's approval, which, as noted, found it a “softer, more appropriate” separation from the surrounding residential properties. Exhibit 33(a).

D. Transportation Issues

Technical Staff of the Transportation Division advise that no new trips will be generated by the increase from 8 to 12 children. Exhibit 22, Attachment 7, pp. 3-4. This is because trip generation rates for child care facilities are based on the number of employees rather than the number of children enrolled. Because the applicant is not increasing the number of employees on the property, Technical Staff concluded that the proposed use will generate no additional peak hour trips during the peak hours. Exhibit 22, Attachment 7. Thus, no traffic study is required for Local Area Transportation Review (“LATR”). Staff also states that Policy Area Mobility Review (“PAMR”) requires mitigation only of *new* peak hour vehicular trips, and therefore, no mitigation is required.

E. Community Reaction

As mentioned elsewhere in this report, the subject petition has support from several neighbors (including one adjacent neighbor and one immediately confronting neighbor) along Sanford Road as well as parents from children enrolled at the daycare. Neighbors in support state that the existing daycare has caused no problems with noise, available on-street parking, and is beneficial to the community. Exhibits 30(a), 30(b), 30(d). Parents state that they have not encountered any difficulty parking on the street during drop-off or pick-up of their children, and usually are able to park directly in front of the property. Exhibit 30(c), 30(e). One parent states that the front of the property will accommodate three cars. Exhibit 30(c).

Both Mr. Gillis and one neighbor on Sanford Road state that there is difficulty finding on-street parking and the road is not wide enough for two vehicles pass each other. Exhibits 24, 27(a). One additional letter opposing the petition came from individuals located on Sherwood Road who believed that the exterior space is not adequate to support the increase in the number of children, that it was a

commercial use in a residential area, and that it would be safer for a daycare having 12 children to relocate into rented space. Exhibit 25.

III. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning ordinance establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff and the Planning Board concluded that Petitioner will have satisfied all the requirements to obtain the special exception, if she complies with the recommended conditions (Exhibits 28 and 34).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Zoning Ordinance §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part IV, below.

A. Standard for Evaluation (Inherent and Non-Inherent Adverse Effects)

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. This provision specifies, “Inherent adverse effects alone are not a sufficient basis for denial of a special exception.” Non-inherent adverse effects are “physical and

operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a “child day care center” use. Characteristics of the “Peekabo Daycare” that are consistent with the “necessarily associated” characteristics of child day care center uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with child day care center uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff identified the following inherent characteristics of a child day care center (Exhibit 22, p. 5):

- (1) vehicular trips to and from the site;
- (2) outdoor play areas;
- (3) noise generated by children;
- (4) drop-off and pick-up areas; and
- (5) lighting.

To this list, the Hearing Examiner would add the need for sufficient parking spaces to accommodate the use.

Technical Staff concluded there were no non-inherent effects of the use. Exhibit 22, p. 6. As stated by Staff,

The proposed child day care facility is approximately 1,000 square feet, and is located in the basement of an existing one-story, single-family detached dwelling. There are no significant traffic impacts that would result from the proposed special exception Staff finds that adequate parking would be available for parents and employees under the special exception proposal, subject to the applicant expanding their driveway (see **Parking** section above for further description). Existing lighting on the property is adequate and consistent with the residential character of the neighborhood. No new lighting will be added. There will be no changes to the existing dwelling, or play area in the rear yard. The front and rear yards are well landscaped with mature trees. Flowers and shrubbery are located in the front, side and rear of the dwelling. There are no unusual characteristics of the site. Staff finds that there are no non-inherent adverse effects arising from the proposed child daycare sufficient to form a basis for denial. (Bold in original).

Certain neighbors on Sanford Road raised concerns primarily regarding the availability of on-street parking. Both Mr. Gillis and Ms. Mary Mindling ascribe the parking problem to another home which have multiple registered vehicles in excess of the amount allowed under the parking restrictions. Exhibit 27(a), T 32-33, 38. Ms. Koushan points out that drop-off and pick-up is permitted on-street under the neighborhood parking restrictions (parking may occur without a permit for less than two hours), that there is almost always a space in front of her house and in front of two neighboring homes, and that 3 of the children enrolled are either hers or the non-resident employee's children. T. 39-40; Exhibit 32. While Technical Staff mistakenly assumed that there were no parking restrictions on the public road in front of the home, evidence supports a finding that the proposed use may operate within the parameters of the neighborhood parking restrictions with the conditions recommended by Technical Staff. Exhibit 32, T. 23-25, 35-36, 39-40. Because any on-street conditions are based on a different use that violates the parking restrictions and because the evidence demonstrates that the Petitioner's use may operate adequately within the parking restrictions, the Hearing Examiner finds that there is a sufficient amount of parking to accommodate the proposed

group daycare home.

The Hearing Examiner finds that the remaining relevant site and operational characteristics of the proposed use are consistent with the inherent characteristics identified for a child day care center. The building is not of an unusual size or design for the neighborhood, but rather is an existing one-family residence in a residential area; the outdoor play area will be enclosed by landscape screening and a chain link fence; given the proposed increase in the size of Petitioner's parking area, the staggered arrival of children, and adequate on-street parking if these two conditions are met, parking for the use will be adequate; lighting is residential in style and will not be increased for this special exception; the amount of traffic generated would not be unusual (or even sufficient to generate a traffic study under the LATR); and operations at the group day care home, from a land use perspective, will be consistent with the typical operations of such a facility.

There may be adverse effects, but they are of a kind that is typically created by this type of use (*i.e.*, inherent), and the Council elected to permit this use in this Zone. Moreover, the adverse effects can be addressed, to some extent, by conditions imposed on special exception, including sufficient on-site parking to accommodate the Petitioner's and resident's vehicles, staggered parent arrival and departure times, and a limitation of 12 on the number of children which may be enrolled at the facility. As a result, and subject to those conditions, the Hearing Examiner finds that the proposed use will not have any non-inherent adverse impact on the neighborhood.

B. General Standards

The general standards for a special exception are found in Code § 59-G-1.21(a). The record in this case provides ample evidence that the general standards would be satisfied, as outlined below.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) -*A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: A group day care home use is a permissible special exception in the R-60 Zone, pursuant to Code § 59-C-1.31.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.13.1 for a Child Day Care Facility use as outlined in Part III.C of this Opinion, below.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The subject site is within the Forest Glen East Area of the Forest Glen Sector Plan, approved and adopted in 1996. Exhibit 22. Technical Staff advises that the plan provides no site-specific recommendations for this property nor does it provide specific guidance on child day care facilities. Exhibit 22. It does, however, recommend R-60 zoning for the property in which child care facilities are permitted by special exception. *Montgomery County Code*, Section 59-C-1.31. Staff found the proposed use to be in conformance with the master plan because it will be located in the

basement of an existing residential home, all outside activities will be in the rear of the property, the lighting is residential in character, and there is sufficient on-street and off-street parking to accommodate the single non-resident employee and parent drop offs and pick ups. Exhibit 22. The Hearing Examiner agrees with this conclusion, and also agrees that the addition of landscaped screening along the perimeter of the rear yard is better in keeping with the residential character of the neighborhood than the wooden fence originally proposed. For these reasons, the Hearing Examiner finds that the use is consistent with the Forest Glen Sector Plan.

(4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.³

Conclusion: For the same reasons set forth in the preceding paragraph, Technical Staff found that the proposed group day care home will be in harmony with the general residential character of the neighborhood because it will be housed in an existing single-family home, and there will be no external changes to that structure. Exhibit 22, p. 7. In addition, Staff did not find an excess of similar uses in the area. Exhibit 22, p. 7. With the additional parking conditions, i.e., widening the driveway to accommodate two cars and staggering parent pick up and drop off times, the Hearing Examiner agrees and so finds.

(5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The Hearing Examiner concludes that the proposed use will not be detrimental to the

³ This section was amended, as set forth here, by Zoning Text Amendment 10-13 (Ord. No. 17-01, effective 2/28/11).

peaceful enjoyment, economic value or development of surrounding properties at the site. As noted above, the proposed use will have only inherent effects on the general neighborhood, and it will provide a useful service for the community.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Based on the nature of the use, it will not cause objectionable vibrations, fumes, odors and dust. No new exterior alterations will be made with the exception of the additional landscaped screen around the side and rear property lines in the rear yard and widening the driveway to accommodate two cars. Play times in the rear yard will not exceed 45 minutes twice a day, and Technical Staff has found that the three existing lights are residential in character. Exhibit 22, p. 5. The Hearing Examiner agrees with this conclusion and finds that this requirement has been met.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff reports that the proposed special exception will not increase the number, intensity or scope of special exception uses sufficiently to affect the area adversely or to “alter the predominantly single-family residential character of the area.” Exhibit 22. Petitioner proposes no new exterior alterations to the existing single-family home and the additional landscaped screening is more in keeping with the residential character of the community than the wooden privacy fence originally proposed. Based on this evidence, the Hearing Examiner finds that this standard has been met.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed group day care home will not be a danger to public health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. Although the adequacy of parking for the proposed use was an issue, for the reasons set forth in Section III.A. of this Opinion, the Hearing Examiner finds that parking for the proposed group daycare home is adequate to support the use.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff reported that the subject property has already been subdivided and will continue to be served by adequate public facilities. Exhibit 22, p. 8. Transportation Division Staff advise that the change from the existing family daycare home to a group daycare home will not generate any new peak hour trips, and therefore no traffic study is necessary to satisfy LATR. For the same reason, PAMR is also satisfied because there are no new peak hour trips to mitigate. Exhibit 22, Attachment 7. Based on this evidence, the Hearing Examiner finds that this standard has been met.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of granting the special exception.*
- (B) *If the special exception:⁴*
(i) does not require approval of a new preliminary plan of subdivision; and

⁴ This section was amended, as set forth here, by Zoning Text Amendment 10-13 (Ord. No. 17-01, effective 2/28/11).

(ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact; then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision and there is no currently valid determination of the adequacy of public facilities for the site, taking into account the impact of the proposed special exception. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). As indicated in the preceding paragraph, Transportation Planning Staff did do such a review, and concluded that both LATR and PAMR are satisfied because no new peak hour trips will be generated by the proposed use. Having no evidence to the contrary in the record of this case, the Hearing Examiner agrees with their conclusions and so finds.

(C) With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.

Conclusion: Technical Staff found that, with conditions requiring widening of the driveway and staggered drop off and pick up times, the proposed use will no adverse impact the safety of vehicular and pedestrian traffic. For the reasons set forth in Section III.A. of this Opinion, the Hearing Examiner agrees and so finds.

C. Specific Standards

The specific standards for Child Day Care Facilities are found in Code § 59-G-2.13.1. The record in this case provides adequate evidence that the specific standards would be satisfied, as

outlined below.

Sec. 59-G-2.13.1. Child day care facility.

(a) *The Hearing Examiner may approve a child day care facility for a maximum of 30 children if:*

(1) *a plan is submitted showing the location of all buildings and structures, parking spaces, driveways, loading and unloading areas, play areas, and other uses on the site;*

Conclusion: The revised Site Plan/Landscape Plan (Exhibit 32(c) and the Lighting Plan (Exhibit 4) satisfy this requirement.

(2) *parking is provided in accordance with the parking regulations of article 59-E. The number of parking spaces may be reduced by the Hearing Examiner if the applicant demonstrates that the full number of spaces required in section 59-E-3.7 is not necessary because:*

(A) *existing parking spaces are available on adjacent property or on the street abutting the site that will satisfy the number of spaces required;*
or

(B) *a reduced number of spaces would be sufficient to accommodate the proposed use without adversely affecting the surrounding area or creating safety problems;*

Conclusion: The number of parking spaces required for this use is determined by Zoning Ordinance §59-E-3.7, quoted above. As already discussed, Technical Staff found that the required number of spaces (i.e., 4 spaces) could be reduced to 3 parking spaces because Ms. Koushan was both a resident and one of the employees and provided that (1) the applicant widened the driveway sufficiently to accommodate all of the household's vehicles and (2) staggered the times of arrival and departure for the children. Exhibit 22, p. 1. For the reasons set forth in Section III. A. of this Opinion, the Hearing Examiner concludes that a reduction in the required off-street parking in this case is reasonable and that parking from the proposed use, with the conditions recommended, is adequate.

(3) *an adequate area for the discharge and pick up of children is provided;*

Conclusion: As noted in the preceding paragraph, Technical Staff found that there was sufficient on-

street parking in front of the Petitioner's home to provide an adequate area for pick up and discharge of children and based on the evidence in this case, the Hearing Examiner agrees that this requirement has been met.

(4) *the petitioner submits an affidavit that the petitioner will:*

- (A) *comply with all applicable State and County requirements;*
- (B) *correct any deficiencies found in any government inspection; and*
- (C) *be bound by the affidavit as condition of approval for this special exception; and*

Conclusion: The required affidavit has been submitted (Exhibit 15(b)).

(5) *the use is compatible with surrounding uses and will not result in a nuisance because of traffic, parking, noise or type of physical activity. The hearing examiner may require landscaping and screening and the submission of a plan showing the location, height, caliper, species, and other characteristics, in order to provide a physical and aesthetic barrier to protect surroundings properties from any adverse impacts resulting from the use.*

Conclusion: Technical Staff found the use to be compatible with the surrounding neighborhood because it will be located in the basement of an existing single-family home and will not require construction of any additional floor space. Exhibit 22, pp. 7, 10. It also found the landscaped screening surrounding the rear yard to be a more appropriate buffer for the surrounding residences than the wooden privacy fence originally proposed. Exhibit 33. With the conditions on arrival/departure times and the increase in the driveway width, Staff found that the use would not have an adverse impact on the neighborhood. Exhibit 22. Based on this evidence, the Hearing Examiner agrees that the use as proposed will be compatible with the surrounding neighborhood and so finds.

(b) *A child day care facility for 31 or more children may be approved by the Board of Appeals subject to the regulations in subsection (a) above, and the following additional requirements: . . .*

Conclusion: Not applicable.

- (c) *The requirements of section 59-G-2.13.1 do not apply to a child day care facility operated by a nonprofit organization and located in: . . .*

Conclusion: Not applicable.

D. Additional Applicable Standards

59-G § 1.23. General development standards

- (a) ***Development Standards.*** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: Located in the R-60 Zone, the propose use is permitted by special exception in the Zoning Ordinance. Technical Staff found that “The property conforms to all applicable development standards of the R-200 zone.” Technical Staff reports that the applicable development standards are met (Exhibit 22, p. 4) and, having no evidence to the contrary, the Hearing Examiner so finds.

- (b) ***Parking requirements.*** *Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: The number of parking spaces required for this use is determined by Zoning Ordinance §59-E-3.7. As previously discussed in this Opinion, the Hearing Examiner finds that there is sufficient parking to meet the Code requirements.

- (c) ***Minimum frontage.*** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*
- (1) *Rifle, pistol and skeet-shooting range, outdoor.*
 - (2) *Sand, gravel or clay pits, rock or stone quarries.*
 - (3) *Sawmill.*
 - (4) *Cemetery, animal.*
 - (5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*

- (6) *Riding stables.*
- (7) *Heliport and helistop.*

Conclusion: This special exception is not included in the above list. Moreover, the proposed use will not result in any change in the site's frontage, which meets required standards.

- (d) ***Forest conservation.*** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Technical Staff determined that this project is exempt from the forest conservation regulations (Exhibit 9). No trees will be removed.

- (e) ***Water quality plan.*** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Inapplicable. This provision applies only to sites where there will be land disturbance within a Special Protection Area, which is not the case here.

- (f) ***Signs.*** *The display of a sign must comply with Article 59-F.*

Conclusion: There is an existing, non-illuminated, free-standing sign identifying the name of the existing family daycare home, "Peekabo Daycare" in the front yard of the residence. Petitioner has already received a permit from DPS for the existing sign and no additional sign is planned. Therefore, the Hearing Examiner finds that this requirement has been met.

- (g) ***Building compatibility in residential zones.*** *Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and*

must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.

Conclusion: There will be no external building modifications, so the building will maintain its residential character.

(h) ***Lighting in residential zones.*** *All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

(1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

(2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: As noted in Section II.B.4 of this Opinion, Technical Staff found that the existing lighting was residential in character and no additional lighting is proposed. The Hearing Examiner therefore finds that there will not be objectionable illumination or glare at the site as a result of the special exception.

Based on the testimony and evidence of record, I conclude that the child day care center use proposed by Petitioner, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part IV of this Opinion and Decision.

IV. DECISION

Accordingly, based on the foregoing findings and conclusions, Petition No. S.E. 11-03 for a special exception in the R-60 Zone to operate a child day care center for up to 12 children in an existing single-family detached home, at 1804 Sanford Road, Silver Spring, Maryland, is **GRANTED** subject to the following conditions:

1. The Petitioner shall be bound by all of her testimony and exhibits of record and by her representations identified in this Opinion and Decision.
2. In accordance with Code § 59-G-2.13.1(a)(4), the Petitioner shall be bound by the Affidavit of Compliance submitted in connection with this case, Exhibit 15(b), in which Petitioner certified that she will comply with and satisfy all applicable State and County requirements, correct any deficiencies found in any government inspection, and be bound by the affidavit as a condition of approval for the special exception.
3. The number of children enrolled at the center shall not exceed 12 children four years of age or younger. The number of non-resident staff present at the facility shall not exceed one (1) non-resident employee.
4. The hours of operation will be between 7:30 a.m. and 6:00 p.m., Monday through Friday. Child care will not be provided on weekends or overnight at any time.
5. Arrival and departure times for the children shall be staggered between 8:00 a.m. and 9:00 a.m. during the morning drop-off and between 4:00 p.m. and 6:00 p.m. in the evening.
6. Petitioner must expand the existing driveway to accommodate two vehicles belonging to residents of her single-family home.
7. Petitioner must provide all the fencing and landscaping depicted on the revised Site Plan/Landscape Plan (Exhibit 32(c)) and as described in Exhibit 32(a) (paragraphs 1 through 5) and the lighting depicted in the Lighting Plan (Exhibit 4).
8. Petitioner must comply with Maryland State and Montgomery County licensure requirements and standards for the operation of a group day care home child day care facility. Petitioner must also comply with all Statement of Operations (Exhibits 10, 20), but the conditions specified in this Opinion and Decision control in the event of any conflict.
10. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special

exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: July 28, 2011



Lynn A. Robeson
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Any person, board, association, corporation or official aggrieved by a decision of the Hearing Examiner under this section may, within ten days after this decision is rendered, appeal the decision to the County Board of Appeals in accordance with the provisions of Section 59-G-1.12(g) of the Zoning Ordinance.

cc: Petitioner
 All parties of record
 The Planning Board
 Department of Finance
 All parties entitled to notice of filing